Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESSEX ELECTRO ENGINEERS, INC.,
Petitioner,

v.

SHEILA E. WIDNALL,
SECRETARY OF THE AIR FORCE,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 41 U.S.C. §§ 607, is a dismissal by an agency board without prejudice to refiling a "decision" from which an appeal to the United States Court of Appeals for the Federal Circuit is mandatory within one hundred twenty days or is such a dismissal "other appropriate action" by the board with the matter to be reinstated if the cause for the interlocutory dismissal is removed within three years as required by Rule 30 issued under the authority of the Act?

PARTIES TO THE PROCEEDING

Petitioner is Essex Electro Engineers, Inc., a small business concern. Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent company or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Essex Electro Engineers, Inc. ["Essex"], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's decision, published at 116 F.3d 461, is reproduced in the Appendix (App.) at 1. The dismissal of Essex's appeals without prejudice by the Armed Services Board of Contract Appeals

["Board"], published at 94-2 BCA ¶ 26,902, is reproduced at App. 10. The reconsideration by the Board affirming the dismissal without prejudice, published at 95-1 BCA ¶ 27,302, is reproduced at App. 6. The Board's decision not to reinstate Essex's appeals after the cause for the dismissal was removed, published at 96-2 BCA ¶ 28,600, is reproduced at App. 4.

JURISDICTION

The Board had jurisdiction for its final decision not to reinstate the appeals under 41 U.S.C. § 607. The earlier dismissal without prejudice by the Board was based on finding that at the time it lacked jurisdiction to proceed with the appeals to a decision. The Court of Appeals had jurisdiction under 41 U.S.C. §§ 607 and 609 and 28 U.S.C. § 1295. The judgment of the Court of Appeals was entered June 24, 1997. This Court has jurisdiction to issue the Writ under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

This case requires an analysis to resolve the inherent tension that exists between the statutory authority of the agency boards to render "decisions" or to "take other appropriate action" on submitted appeals under 41 U.S.C. § 607 and the consequent effect on appeal rights to the Federal Circuit. This analysis is particularly critical in the absence of rules issued under this Court's authority in 28 U.S.C. § 1292(e) and involves consideration of the following provisions:

41 U.S.C. § 607. Agency boards of contracts appeals.

(d) Jurisdiction.

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer...In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

(e) Decisions.

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted....

(g) Review.

(1) The decision of an agency board of contract appeals shall be final, except that--

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision....

(h) Procedural guidelines.

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C. § 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this

chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards....

Agency Board Rule 5. Motions.

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed....The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

Agency Board Rule 30. Suspensions; dismissal without prejudice.

...In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

28 U.S.C. § 1291. Final decisions of district courts.

...The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit.

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(3) of an appeal from a final decision of the United States Court of Federal Claims;...

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1))...

28 U.S.C. § 1292. Interlocutory decisions.

(d)(2)...when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

STATEMENT OF THE CASE

The Relationship Between the Parties

At the end of December, 1989, the government awarded two competitive, fixed price, small business contracts to Essex, Contract F41608-90-D-0410 ["Contract-0410"] for Floodlight Sets and Contract F41608-90-C-0409 ["Contract-0409"] for related spare parts. [App. 10]. Essex could not proceed with production and delivery until completion and government approval of first article testing, which was scheduled for August 2, 1990. Deliveries were scheduled to be completed in February, 1991.

Beginning in March, 1990, and continuing through July, 1990, Essex discovered and notified the government of deficiencies in the government's drawings and specifications [App. 11]. During meetings in July, 1990, the government representatives reviewed and discussed Essex's plan to obtain diesel engine generators for the floodlight sets from a source other than the "Suggested Source" on the government's drawing. [App. 11].

Yet, months later, after the drawing deficiencies were corrected and Essex had completed the first article and was ready to proceed with the testing, in January, 1991, a new contracting officer withheld approval to start testing unless Essex used the "suggested" engine generator or "qualified" Essex's selected engine generator source by performing criteria and testing in addition to the first article tests in the Contract. [App. 13]. Essex immediately notified the contracting officer that the additional qualification criteria and testing

violated the Contract and required a contract modification. [App. 13-14]. In April, 1991, the contracting officer again stated that he would not authorize first article testing unless Essex either used the "suggested" engine generator or qualified Essex's selected source [App. 14]. In early May, 1991, Essex notified the contracting officer that it was his "obligation to issue a Final Decision" ordering performance in accordance with his interpretation. [App. 16].

The Government then issued "termination for convenience" notices in late June, 1991, on "Contract-0410" and in late July, 1991, on "Contract-0409." [App. 18].

Essex made a written submission for Contract-0410 in June, 1992, containing a recitation of the facts and seeking $635,434, as "[o]ur Claim, certified as required by the Act...for changes including the Government-caused first article delays and production disruption...[and] the previous disputes regarding the specification control drawings and deficient Government technical data..." [App. 19-20]. Essex further demanded a contracting officer's decision and insisted "upon the time requirements of the Contract Disputes Act for a response to this claim." [App. 20]. In July, 1992, Essex made a similar submission for Contract-0409 seeking $20,603, and including the foregoing statements, except noting that, since the amount did not exceed $50,000, a CDA certification was not necessary. [App. 22-23].

In essentially duplicate letters, in July and August, 1992, a Termination Contracting Officer ["TCO"] asserted that each of Essex's submissions were "not a claim for purposes of the Act." The letters cited *Mayfair*

Construction Company v. United States, 841 F.2d 1576 (Fed.Cir. 1988), and *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed.Cir. 1991). [App. 20-24].

By letters in September and October, 1992, Essex resubmitted its claims "solely for the purpose of preserving Essex's rights and in no way...a waiver of the existence of the valid and lawful claim." Essex noted that the TCO had "already failed to take prompt action to resolve the claims as required by FAR § 49.101(d) [which is applicable to a small business concern such as Essex] and the CDA..." [App. 24-28].

The Proceedings Below

No decisions by the contracting officer were issued on Essex's claims. After waiting six and seven months, respectively, in January, 1993, Essex filed notices of appeal to the Board from the contracting officer's failure to decide. The appeals were docketed as ASBCA No. 45663 and 45664. [App. 28]. Essex filed its Complaints and served discovery requests in March, 1993. The government filed no answer to the Complaints. Rather, in June, 1993, the government filed a Motion for a Protective Order to foreclose any discovery by Essex and a Motion to Dismiss, citing *Mayfair, supra.*, and *Dawco, supra*.

Ten months later in April, 1994, the Board dismissed Essex's appeals "without prejudice" to resubmission of "proper" claims. The Board relied on *Mayfair, supra.*, and *Dawco, supra.*, and its own decision in *Reflectone, Inc.*, ASBCA No. 43081, 93-1 BCA ¶ 25,512, holding that Essex's submissions were

not CDA claims because "there was no underlying dispute" before the claims were submitted and "[t]his Board, of course, is obliged to follow the precedents of the Federal Circuit." [App. 30-31, 34].

Eleven days later, on May 5, 1994, Essex moved the Board for reconsideration and, while continuing to question the applicability and validity of *Mayfair, supra.*, and *Dawco, supra.*, Essex pointed out that its demand of May 6, 1991, for a contracting officer's decision on the specification control drawing dispute was itself a proper CDA claim for an interpretation of contract terms or, at least, evidenced a pre-existing dispute. [App. 8]. In November, 1994, the Board affirmed its earlier dismissals without prejudice. [App. 9].

In the meantime, on June 14, 1993, Essex had submitted a separate CDA certified claim for damages for the government's breach and repudiation in ending Contract-0410 in bad faith. Eight months later, no final decision had been rendered by the contracting officer and Essex filed another appeal to the Board, which was docketed as ASBCA No. 47167. The filing of that appeal allowed Essex to begin discovery.

After two years, in July, 1994, a contracting officer issued a decision on Essex's first claim, allowing less than 10% and nothing for the increased costs for the drawing deficiencies and the delays and disruptions. Essex filed another appeal and requested consolidation with its earlier appeals. Essex also filed another notice of appeal from the contracting officer's continuing failure to decide the initial claim on Contract-0409 and also requested consolidation. To date, the merits of Essex's claims have not been resolved.

On July 26, 1995, the United States Court of Appeals for the Federal Circuit issued its *en banc* decision in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed.Cir. 1995), specifically reversing the Board's decision in *Reflectone, supra.*, restricting *Mayfair, supra.*, and overruling *Dawco*, *supra.*, and "all cases relying on *Dawco*." Thirteen days later, on August 8, 1995, Essex filed its motion to set aside the Board's prior dismissals without prejudice and to reinstate the appeals, citing the Board's Rules, the guidance provided by the Federal Rules of Civil Procedure, and the decision in *Reflectone*. [App. 4].

More than one year later, in October, 1996, the Board issued its decision, denying Essex's motion to reinstate the appeals and holding that the dismissals were final. [App. 6]. Essex's Appeal to the Federal Circuit followed immediately. On June 24, 1997, the Court of Appeals affirmed the Board's refusal to reinstate, holding that the Board's earlier dismissal without prejudice had become final 120 days after it was entered and could not thereafter be appealed. The Court reached its conclusion even though it recognized that "Rule 30 provides that an appeal dismissed without prejudice becomes an appeal dismissed with prejudice if not reinstated within three years." [App. 1-3].

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals has affirmed action by the Board which materially departs from the authority for Board proceedings mandated by Congress in the Contract Disputes Act, as implemented in the Board's own Rules, and alters the appellate jurisdiction

conferred on the Court of Appeals. Essex has thus been denied access to the Board for a decision on the merits of its initial appeals with the consequent denial of fundamental rights afforded by the Act.

The Board dismissed Essex's appeals "without prejudice" by concluding that it was prevented from proceeding to a decision based on its own *Reflectone* decision, and because it was "obliged to follow" the decisions of the Federal Circuit in Mayfair and *Dawco*, *supra.*, which had held that there can be no explicit or presumed decision of a contracting officer if it is found that no dispute had existed before a Contract Disputes Act "claim" was submitted.[1] Nine months after the Board reconsidered and reiterated its dismissal without prejudice, the Federal Circuit decided *Reflectone, supra., en banc*, reversing, restricting, and overruling every reason for the Board's inability to proceed with Essex's appeals. Essex immediately moved the Board to reinstate its appeals. The Board's ultimate decision, refusing to reinstate the appeals, rendered the dismissals final with prejudice. The Court of Appeals affirmed the Board's refusal to vacate and reinstate for two stated reasons [App. 2-3]:

1. Even though "Rule 30 provides that an appeal dismissed without prejudice becomes an appeal dismissed with prejudice if not reinstated within three years...[i]t does not, however, provide a mechanism to reinstate a dismissed appeal." An appeal to the Federal

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[1]Explicit and presumed decisions by contracting officers are defined in 41 U.S.C. § 605(a) and (c), respectively.

Circuit from the earlier dismissals without prejudice was required within 120 days from the date they were entered and "could not thereafter be appealed. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991)."

2. The Court of Appeals was not being "inconsistent with *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537 (Fed.Cir. 1996). In that case, the appellant filed a notice of appeal within 120 days of the judgment of the Court of Federal Claims and requested a stay pending our decision in *Reflectone*, a situation completely different from this one."

The Appellate Court has Abrogated the Rule Issued for the Board to Carry Out the Provisions of the Act and Contradicted the "Norm" Defined by this Court

The Board's authority extends only to issuing a "decision" on an appeal from a decision of a contracting officer or taking "other appropriate action" on a submitted appeal. [41 U.S.C. § 607(d) & (e)]. The Federal Circuit's jurisdiction on appeals that are required to be filed "within one hundred twenty days" is limited to review of a "decision" of the Board, with no mention of reviewing "other appropriate action" the Board may take on a submitted appeal. [41 U.S.C. §607 (g)(1)(A); 28 U.S.C. § 1295(a)(10)].

The Court of Federal Claims has explicit statutory authority to issue interlocutory orders with the Federal Circuit then having jurisdiction for a discretionary appeal, if the necessary statement is included in the lower court's order. [28 U.S.C. §§ 1291 & 1292(d)(2)]. "Interlocutory" is defined as "[s]omething intervening

between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." *Black's Law Dictionary*, West, 6th ed., p. 815 (1990). A dismissal without prejudice to refiling would not be an adjudication upon the merits in a proceeding under Rule 41(b) of the Rules of the Court of Federal Claims and would not be appealable because it contemplates further proceedings in the same forum. [*Cf., Peters v. Welsh Development Agency*, 920 F.2d 438, 440 (7th Cir. 1990); *California v. Harvier*, 700 F.2d 1217, 1218-19 (9th Cir. 1983); *Mesa v. U.S.*, 61 F.3d 20, 21 (11th Cir. 1995)].

The only statutory authority for the Board to issue such interlocutory orders resides in the provision for "other appropriate action" under procedural guidelines to be issued "to carry out the provisions" of the Act. [41 U.S.C. § 607(d), (e) & (h)]. It must be recognized that, while the authority of the Court of Federal Claims to issue interlocutory orders and discretionary appeals from those orders is clearly expressed in the statutory provisions, the Supreme Court has not exercised its rule-making authority to "provide for an appeal of an interlocutory decision to the courts of appeals," in connection with such decisions by the Board. [28 U.S.C. § 1292(e)]. In addition, if interlocutory authority of the Board resides in the provision for "relief that would be available" in the Court of Federal Claims [41 U.S.C. § 607(d)], the Board's dismissals of Essex's appeals without prejudice did not contain the statement required for such a decision by the Court of Federal Claims that would then give rise to a discretionary appeal to the Federal Circuit. [28 U.S.C. § 1292(d)(2)].

Among the Rules that have been issued for the Board "to carry out the provisions" of the Act, Rule 5 concerns the potential for a limitation on the Board's jurisdiction that would prevent it from proceeding to a decision in a particular case. Rule 30 is the only Rule which then addresses a dismissal without prejudice by the Board, if the "Board is unable to proceed with disposition...[of a case] for reasons not within the control of the Board..." The Board may "dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed." Either party or the Board may then act "within three years to reinstate any appeal dismissed without prejudice." Contrary to the conclusion of the Federal Circuit, Rule 30 establishes not only the mechanism but also the time limit for reinstating "any appeal dismissed without prejudice." Such a dismissal is not a "final decision of an agency board" under the Contract Disputes Act from which an appeal to the Federal Circuit is required within 120 days, particularly here, where the predicate for the Board's dismissal was that there had been no "claim" or decision of the contracting officer on which the Board could render a decision in the appeals under the Act. [41 U.S.C. § 607(g)(1)(A); 28 U.S.C. § 1295(a)(10)].

The Federal Circuit's citation to this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), is misplaced and neither expands the meaning of "decision" of the Board, in contrast with "other appropriate action" by the Board, nor does it restrict the reinstatement period defined by Rule 30. *James B. Beam Distilling Co.* involved an action filed in Georgia seeking a refund of taxes paid under Georgia law

applicable to 1982 through 1984, based on a decision of this Court in 1984, holding that similar laws in Hawaii violated the Commerce Clause. The Court held that the retroactivity of a decision is a choice-of-law question:

> "As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. **This practice is overwhelmingly the norm**...." 501 U.S. at 535, 111 S.Ct. at 2443; emphasis added.

As for a second way of resolving the problem, "a purely prospective method of overruling" is used by "announcing the new" as effective only after the date of the decision. 501 U.S. at 536, 111 S.Ct. 2443. There was no announcement of prospectivity by the Federal Circuit in *Reflectone, supra.*

The third way of resolving the problem would be "selective prospectivity" but that "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally...[S]elective prospectivity appears never to have been endorsed in the civil context." 501 U.S. at 537-38, 111 S.Ct. at 2444-5.

In its citation to *James B. Beam*, the Federal Circuit below only refers to 501 U.S. at 541, without discussing the foregoing choice-of-law analysis and the "norm" defined by this Court. At the cited page in the

decision, this Court merely reiterated the rule that retroactivity is limited only "by *res judicata* or by statutes of limitation or repose." A dismissal without prejudice to refiling is not a decision on the merits and has no *res judicata* effect. The only "limitation" that exists with respect to a Board dismissal without prejudice is Rule 30 providing for reinstatement within a period of three years if the cause for the dismissal is removed. The *en banc* decision in *Reflectone, supra.,* removed the cause for the Board's dismissals of Essex's appeals without prejudice and Essex timely sought reinstatement within sixteen months after the initial dismissals and less than nine months after the Board's reconsideration and reiteration of the dismissals without prejudice.

Essex has been Foreclosed from its Right to an Efficient and Fair Resolution of its Claims

In May, 1991, Essex submitted a written demand for a contracting officer's final decision on the dispute regarding the interpretation of the contract terms applicable to the Specification Control Drawing. In June, 1992, Essex submitted a written demand for a contracting officer's final decision on an amount exceeding $50,000 with a proper certification required by the Contract Disputes Act. In July, 1992, Essex submitted a written demand for a contracting officer's final decision on an amount on the second contract which was less than $50,000. In September and October, 1992, Essex resubmitted its previous demands. After more than five years, no decision has yet been rendered on the merits of Essex's claims and appeals to the Board.

When it overruled the cause for the Board's dismissal of Essex's appeals wiithout prejudice, the Federal Circuit acknowledged that--

> "*Dawco* has proven to be inimical to at least two goals of the CDA: providing for the efficient and fair resolution of contract claims. *See*, Report of the Senate Governmental Affairs Committee and the Senate Judiciary Committee on the Contract Disputes Act of 1978, S.Rep. No. 1118, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238."
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>
> "A dispute requirement that allows the government to unilaterally designate when a submission becomes a 'claim' disrupts the balance of power between the government and contractors that the CDA sought to establish. [*Id.*]...The purpose of awarding interest to contractors from the submission date of a successful claim is to compensate them for a legitimate cost incurred when required by the government to perform the additional work of a changed contract. *Id...*at 5266. Allowing the government to unilaterally determine a claim's submission date would vitiate this purpose.
>
> "The parties are not prevented or discouraged from settling their differences because the first written demand for payment...is recognized and treated as a CDA 'claim.' If anything, such a rule promotes settlement by preventing procrastination." *Reflectone*, 60 F.3d at 1580, 82-83.

The dismissal of Essex's appeals without prejudice denied Essex's right to fundamental "goals" in the Contract Disputes Act, and has allowed massive procrastination in the resolution of the merits of Essex's claims. In *Reflectone,* 60 F.3d at 1578, under the heading, *"Dawco's Holding is Overruled"*, the Federal Circuit first discussed its prior decision in *Mayfair Construction Co., supra.*, which had served as the underpinning for *Dawco* and for the Board's dismissal without prejudice here. The *Reflectone* Court held that Mayfair was "mistakenly quoted in *Dawco*," because it had been based on--

> "...interim regulatory language incorporated into the contract's disputes clause explicitly requiring that a claim be in dispute when submitted...., therefore, *Mayfair* provides no support for requiring a pre-existing dispute in any case involving contracts resulting from solicitations issued after June 1, 1980." *Reflectone*, 60 F.3d at 1579.

The *Reflectone* Court then concluded:

> "We hold that properly construed for its plain meaning, the language of FAR 33.201 does not require that a payment demand contained in a purported CDA claim be in dispute before being submitted for decision to the CO unless that demand is a 'voucher, invoice or other routine request for payment.' To the extent that *Dawco* and **cases relying on *Dawco* can be read to suggest otherwise, they are overruled**." *Id.*, 60 F.3d at 1583; emphasis added.

Further, on August 26, 1996, the Federal Circuit decided *James M. Ellett Constr. Company, Inc. v. United States*, 93 F.3d 1537 (Fed.Cir. 1996), which was an appeal from a final judgment entered by the Court of Federal Claims dismissing Ellett's suit in relying on *Dawco, supra.* As a consequence of its *en banc* decision in *Reflectone*, "overruling the cases upon which the trial court had relied in dismissing Ellett's complaint," the Court reversed and remanded Ellett's case to the lower court for further proceedings. *Ellett*, 93 F.3d at 1539. Also, pertinent to the termination claims here, the Court in *Ellett*, observed:

> "...it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience. Such a demand...is certainly less routine than a request for an equitable adjustment." *Id.*, 93 F.3d at 1542.

The Board's own Rules, issued under the statutory authority for guidelines to "carry out the provisions" of the Contract Disputes Act, deny finality to a dismissal without prejudice for a period of three years and render "any appeal" subject to reinstatement when the cause for dismissal has been removed within that period. The cause for the dismissal of Essex's appeals without prejudice was emphatically removed by the Federal Circuit's decision in *Reflectone,* as was further emphasized by the Federal Circuit's decision in *Ellett.* Yet, when Essex acted to obtain reinstatement of its appeals, the Board refused.

The Board's decision denying reinstatement cited neither its Rules nor any authority. It referenced only its

Opinion in *Electronics & Space Corp.*, ASBCA No. 37352, 95-1 BCA ¶ 27,306. [App. 5]. Yet, that case had not involved *Dawco, supra.*, nor *Reflectone, supra.*, nor the Board's Rule 30. In *Electronics & Space*, the contractor sought to vacate a prior dismissal that had been entered in *Electronics & Space Corp.*, ASBCA No. 37352, 92-2 BCA ¶ 24,978, which had been based on the Federal Circuit's decision in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed.Cir. 1991), *cert. denied*, 502 U.S. 919, 112 S.Ct. 330. The *Grumman* decision had held that the CDA certification was a jurisdictional prerequisite to a CDA "claim." As the Board held in *Electronics & Space*, 95-1 BCA ¶ 27,306, *Grumman Aerospace, supra.*, was never overruled and, when Congress eliminated any jurisdictional effect in the CDA certification, it expressly barred a retroactive effect. Federal Courts Administration Act of 1992, Public Law No. 102-572, § 907, 6 Stat. 4518. *Electronics & Space Corp.* was patently inapposite to the instant situation.

In reality, the Board's decision here created a direct conflict with its own decision in *Mediax Interactive Technologies, Inc.*, ASBCA No. 43961, 93-3 BCA ¶ 26,071, at p. 129,582 [dismissal without prejudice "did not render appellant's original proposal a 'nullity'" preventing consideration seven years later], and with a decision by the Engineers Board of Contract Appeals in an identical situation. In *Midland Maintenance, Inc.*, ENG BCA Nos. 6080, et al., 96-1 BCA ¶ 27,983, the Board had earlier dismissed the appeals for lack of jurisdiction based on the Federal Circuit's initial panel decision in *Reflectone*, which had affirmed the Board's dismissal in *Reflectone, Inc.*, 93-1 BCA ¶ 25,512. Then, after the *en banc* decision in *Reflectone, Inc. v.*

Dalton, supra., vacated the panel decision, reversed the Board's decision, and overruled *Dawco, supra.*, the Board in *Midland*, 96-1 BCA ¶ 27,983, vacated its earlier dismissals and reinstated the dismissed appeals. Rule 30, issued to "carry out the provisions" of the Contract Disputes Act, is the same for the Engineers Board of Contract Appeals as it is for the Armed Services Board of Contract Appeals.

Well within three years, the reason that prevented the Board from proceeding to a decision and caused the interlocutory dismissal of Essex's appeals without prejudice ceased to exist when the Federal Circuit decided *Reflectone, supra.* The appeals were required to be reinstated as provided in Rule 30. The Board's ultimate decision refusing to do so was plainly wrong, as is the Federal Circuit's decision to affirm that refusal.

CONCLUSION

For these reasons, Essex's petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

September 5, 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NO.

ESSEX ELECTRO ENGINEERS, INC.,
Petitioner,

v.

SHEILA E. WIDNALL,
SECRETARY OF THE AIR FORCE,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-1046

ESSEX ELECTRO ENGINEERS, INC.,
Appellant,

v.

AIR FORCE,
Appellee.

DECIDED: June 24, 1997

Before MAYER, Circuit Judge, SKELTON, Senior Circuit Judge, and BRYSON, Circuit Judge.

PER CURIAM.

Essex Electro Engineers, Inc. appeals the decision of the Armed Services Board of Contract Appeals, ASBCA Nos. 45663 and 45664, 96-2 BCA ¶ 28,600, denying Essex's motion to vacate the board's prior decision dismissing Essex's appeal without prejudice, for lack of jurisdiction. We affirm.

Essex entered into two contracts with the Air Force for the manufacture and delivery of floodlight sets and spare parts. Prior to completion of the contracts, the Air Force terminated the contracts for convenience. Essex then submitted settlement proposals to the termination contracting officer (TCO), seeking termination costs and interest on these costs. Relying on *Mayfair Construction Co. v. United States*, 841 F.2d 1576 (Fed.Cir. 1988), and

Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed.Cir. 1991), the TCO determined that the interest Essex sought was not recoverable and that each submission was a "voucher, invoice, or other routine request for payment that [was] not in dispute when submitted and [was] not a claim for purposes of the [Contract Disputes] Act." Essex appealed the decision to the board, which dismissed the appeal for lack of jurisdiction, also relying on this court's *Mayfair* and *Dawco* cases, as well as the board's decision in *Reflectone, Inc.*, ASBCA No. 43081, 93-1 BCA ¶ 25,512 (1992).

More than eight months later, we reversed the board's decision in *Reflectone*, holding that a submission need not be in dispute before it can be a claim under the Act. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed.Cir. 1995)(en banc)(overruling *Dawco*, in part). Thirteen days later, Essex moved to vacate the board's earlier dismissal, and asked for retroactive application of this court's *Reflectone*. The board denied the motion.

The board's first decision was not the result of inadvertent error or a mistake of law. It correctly relied upon precedent binding at the time, and Essex chose not to appeal. As a result, that decision became final 120 days after it was entered, 41 U.S.C. § 607(g)(1)(A) (1994), and could not thereafter be appealed. *See, James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991).

Essex argues that ASBCA Rule 30 permits reopening an appeal up to three years after it has been dismissed. Rule 30 provides that an appeal dismissed without prejudice becomes an appeal dismissed with prejudice if not reinstated within three years. It does not, however, provide a mechanism to reinstate a dismissed

appeal. Nor is the result reached today inconsistent with *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537 (Fed.Cir. 1996). In that case, the appellant files a notice of appeal within 120 days of the judgment of the Court of Federal Claims and requested a stay pending our decision in *Reflectone*, a situation completely different from this one.

Accordingly, the decision of the Armed Services Board of Contract Appeals is affirmed.

AFFIRMED.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Essex Electro Engineers, Inc.	)	ASBCA Nos. 45663
	)	and 45664
Under Contract Nos.	)	
F41608-90-D-0410	)	
F41608-90-C-0409	)	

OPINION BY ADMINISTRATIVE JUDGE PAUL
ON APPELLANT'S MOTION TO VACATE EARLIER OPINIONS

Dated: October 15, 1996

On 20 April 1994, the Board issued a decision, 94-2 BCA ¶ 26,902, in which it dismissed these appeals without prejudice for lack of jurisdiction. Noting that appellant Essex Electro Engineers, Inc.'s (Essex) termination for convenience settlement proposals were not in dispute at the time they were submitted, we held that Essex had not filed cognizable claims under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.* (CDA). In reaching its decision, the Board relied upon a host of precedents, including *Dawco Construction Inc. v. United States*, 930 F.2d 872 (Fed.Cir. 1991), and *Reflectone, Inc.*, ASBCA No. 43081 93-1 BCA ¶ 25,512. Essex filed a timely motion for reconsideration which we denied in a decision, 95-1 BCA ¶ 27,302, dated 18 November 1994. Essex did not perfect an appeal to the United States Court of Appeals for the Federal Circuit.

On 26 July 1995, the Federal Circuit issued its opinion in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed.Cir. 1995), in which it reversed the Board's decision and overruled its opinion in *Dawco, supra*. On 8 August

1995, Essex filed a motion to vacate our earlier decision dismissing its appeals for lack of jurisdiction. It cited, *inter alia*, the Federal Circuit's opinion in *Reflectone* and "the guidance provided by the Federal Rules of Civil Procedure." The parties briefed this issue extensively over a period of several months.

DISCUSSION

A similar situation arose in *Electronics & Space Corp.*, ASBCA No. 37352, 95-1 BCA ¶ 27,306. Appellant moved to vacate the Board's earlier decision, 92-2 BCA ¶ 24,978, "which found the certification of appellant's claim for over $7 million was inadequate and dismissed the appeal without prejudice...." After we issued our initial decision, appellant failed either to file a motion for reconsideration or to perfect an appeal with the Federal Circuit. Subsequently, our appellate court issued a string of decisions which undermined earlier opinions upon which the Board had relied. Thereupon, appellant filed its motion to vacate.

Citing the FRCP as guidance, the Board ruled that its earlier decision was not "the result of an inadvertent error or a mistake of law under such exceptional circumstances as would justify vacating" it. The Board noted also "[a]ppellant's decision not to seek court review of the adverse Board decision," as well as its delay in filing the motion to vacate. We denied the motion.

It is true that, in this instance, Essex filed a timely motion for reconsideration; however, like the appellant in *Electronics & Space, supra*, it did not appeal to the Federal Circuit. It thus acquiesced in the correctness of our decision until it became award of the appellant court's decision in *Reflectone, supra*. At the time we issued our

initial opinion, the Board was correct in relying upon such binding precedent as *Dawco, supra.* Therefore, it cannot be stated that our decision was "the result of an inadvertent error or a mistake of law." As a result of Essex's failure to appeal, the decision became final and constitutes the law of this case.

CONCLUSION

The motion is denied.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Essex Electro Engineers, Inc.	)	ASBCA Nos. 45663
	)	and 45664
Under Contract Nos.	)	
F41608-90-D-0410	)	
F41608-90-C-0409	)	

OPINION BY ADMINISTRATIVE JUDGE PAUL
ON APPELLANT'S MOTION FOR RECONSIDERATION

Dated: November 18, 1994

In a lengthy decision issued on 20 April 1994, 94-2 BCA ¶ 26,902, the Board dismissed appellant Essex Electro Engineers, Inc.'s (Essex) appeals without prejudice for lack of jurisdiction. Explicating the underlying facts in great detail, we ruled that "[i]t is now well-settled that when the parties are in a pre-dispute, negotiation posture, a contractor's submissions will not be considered claims even though he has invoked the CDA [Contract Disputes Act] and has characterized his submissions as claims." We also gave credence to the affidavit of the Government's auditor which attributed the time consumed in processing Essex's submissions to Essex' lack of cooperation rather than to any delay on the Government's part.

Essex subsequently filed a motion for reconsideration in which it set forth 5-1/2 pages of "facts" and several pages of "discussion." A detailed review of Essex's "facts" demonstrates that appellant has failed to elicit any new material and has simply distilled the factual narratives from its earlier briefs. Similarly, Essex's legal

arguments are largely a recitation of the contentions which it had already raised in this proceeding.

The boards of contract appeals have repeatedly denied motions for reconsideration where a party has presented no new evidence or arguments which were not considered in the initial decision. *Boeing Aerospace Operations, Inc.*, ASBCA No. 46274, 46275 (slip op. 9 Nov. 1994); *Scott Peterson Construction Co.*, ASBCA No. 47028 (slip op. 15 Aug. 1994); *Optimal Data Corp.*, NASABCA No. 381-2, 85-2 BCA ¶ 18,165, *aff'd*, 802 F.2d 469 (Fed.Cir. 1986); *Ben Henderson Logging*, AGBCA No. 86-288-1, 86-3 BCA ¶ 19,212; *Eagle Contracting, Inc.*, AGBCA No. 92-197-R, 93-1 BCA ¶ 25,320. Moreover, as the United States Claims Court held in *Weaver-Bailey Contractors, Inc. v. United States*, 20 Cl.Ct. 158, 158-59 (1990): "[A] motion for reconsideration should not be used as a substitute for an appeal." To the extent that Essex has simply rehashed facts and arguments which we have already carefully considered, we see no basis for altering our decision.

Two matters raised by Essex, however, deserve further analysis. First, in a supplement to its motion, Essex contends that the Board's decision in *S-TRON*, ASBCA No. 45890, 94-2 BCA ¶ 26,957, is "in direct conflict with the decision in the instant appeals." Essex is mistaken. In *S-TRON, supra*, we took jurisdiction over the appeal at least partially on the basis that the Government had delayed "for an unreasonable length of time" in processing the contractor's submissions. Here, we gave credence in our initial decision to the auditor's affidavit which attributed the time consumed in processing Essex's submissions to Essex rather than to the Government. The auditor's affidavit was unrebutted, and Essex has not convinced us that we erred in this regard. Hence, our

decision in *S-TRON, supra*, is distinguishable from our initial decision in these appeals.

Essex also belatedly attacks the auditor's affidavit and contends, somewhat surprisingly, that it was not given an opportunity to rebut the auditor's statements. First, the Board simply notes that, as pointed out by the Government in its opposition brief, Essex could have rebutted these assertions if it chose to do so. Indeed, Essex filed a motion to strike the auditor's affidavit; however, it did not append to its motion any evidentiary materials rebutting his statements. Therefore, this argument must fail. Finally, even at this juncture, Essex has not persuaded us that we erred by giving credence to the auditor's assertions.

CONCLUSION

We have reconsidered our initial decision and affirm it.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Essex Electro Engineers, Inc.	)	ASBCA Nos. 45663
	)	and 45664
Under Contract Nos.	)	
F41608-90-D-0410	)	
F41608-90-C-0409	)	

OPINION BY ADMINISTRATIVE JUDGE PAUL

Dated: April 20, 1994

The Government moves to dismiss these appeals for lack of jurisdiction, asserting that appellant's termination for convenience settlement proposals were not proper claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. Appellant Essex Electro Engineers, Inc. (Essex) opposes the Government's motions. It contends that the settlement proposals were presented to the contracting officer under a disputatious context, and, thus, constituted proper CDA claims. We present the following facts solely for the purpose of resolving these motions.

FACTUAL BACKGROUND

The Government awarded Essex contract No. F41608-90-D-0410 (0410), for the supply of an indefinite quantity of TF-1 floodlight sets (ASBCA No. 45663), and contract No. F41608-90-C-0409 (0409), for the supply of spare parts for the TF-1 floodlight sets (ASBCA No. 45664). Both contracts contained the following relevant clauses:

TERMINATION FOR CONVENIENCE
OF THE GOVERNMENT
(FIXED-PRICE) (Apr 1984)

(a) The Government may terminate performance of the work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

* * *

(i) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer....

* * *

DISPUTES (Apr 1984)

(a) The contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(R4, tab 1)

In July 1990, Essex informed the Government that it had discovered several defects in the design drawings during the course of assembling the first article unit (complaint at 7). On 10 July 1990, the Government conducted a post-award conference at Essex's facility. During the conference, appellant advised the Government of its intention to substitute an alternate engine and generator. At the Government's request, appellant agreed to provide sufficient information demonstrating that the alternate engine and generator met the "form, fit

and function" requirements of contract No. 0410 (ASBCA 45663, R4, tab 29).

By letter dated 8 January 1991, the contracting officer (CO) stated that if appellant intended to use an alternate engine and generator -- as discussed during the 10 July 1990 post-award conference -- it had to submit a substitution proposal, including "all relevant technical and pricing data." The CO asserted:

> 2. If the contractor intends to make any substitution of part numbers identified in notes, bill of materials, or control drawings; the contractor shall submit alternate items for coordination. This requirement is specifically stated in the contract on AFLC Form 762 page 9, Note 7.1, sentence two, "Any substitution of parts from data package shall be coordinated with government procurement agency prior to installation."
>
> 3. Installation of substitute parts without coordination is cause for disapproval of the first article and first article testing.... "Nonconformance with any specified requirements or presence of one or more deviations may constitute cause for rejection." Deviation as used in this context includes all deviations from commercial parts specified or controlled by government furnished data.
>
> * * *
>
> 5. With specific reference to substitution of an alternate item for Generator Set, Diesel Engine-6KW, identified by 8324322-10 in government furnished data, Note 2 on drawing 8324322 specifies MODEL NO 6.0 DJE-3CE/24365AE as

the proper part. If, as EEE has indicated, substitution for this generator is planned, then EEE is required to identify the proposed alternate generator set and submit a proposal, including all relevant technical and pricing data, to verify equivalence and compliance to requirements to Diesel Driven Generator Set, 8324322-10. EEE's previous attempts to provide the needed information through DCMDC GCAB-FC (Mrs. Krist) letter 17 Sept 90 (Atch 1) did not provide sufficient technical information for us to determine whether this proposed alternate generator set will be an acceptable substitute for the specified generator set.

6. In reflection on the development to this contract requirement, no substitution of an alternate generator set was intended or provided for in the first article testing requirements. The specification control drawing is not complete enough to meet all of the salient characteristics of the Air Force needs. In order to qualify any substitute generator set, the criteria outlined in Generator Set Appendix (ATCH #2) must be met and additional first article tests are required.

(ASBCA 45663, R4, tab 41)

On 14 January 1991 appellant stated that it had completed the fabrication of the first article test unit and requested that the Government establish a date to commence first article testing. In addition, Essex characterized the CO's demand that the installation of the engine in the first article test unit be qualified and subjected to additional tests to be n violation of both the explicit terms of the contract and of DOD-STD-100C:

> Based on the foregoing we request you reconsider the statement in the Letter Para 6.... The drawings are specification of the contract and are warranted by the Government to be complete, accurate, and current, and that if followed will result in an item conforming to the contract requirements. The attachment that you cite is not part of the contract. The addition of ATCH #2 of the contract would required the issuance of a contract modification.
>
> * * *
>
> Based on the foregoing, we do not believe that there is a unilateral uncompensated right in the Government to refuse to accept as First Articles and Production Units, supplies meeting contract requirements because they are fabricated using the Essex generator.

(ASBCA 45663, R4, tab 42)

By letter dated 25 April 1991, the CO stated he would authorize first article testing to commence only if Essex either 1) provided a first article test unit which contained the exact engine suggested in the Government's specification control drawing or 2) qualified an alternate engine in accordance with the requirements of the CO's letter of 8 January 1991:

> 1. In your 14 January 91 letter, paragraph 1, it is stated that Essex Electro Engineers (Essex) had previously informed SA-ALC that the first Article has been completed and that Essex is ready to schedule first article testing. That statement is not consistent with the available information. No written notice of a completed first article unit was received until your letter of 12 April 1991. In view

of the discussion below, it would seem impossible for a first article to be completed especially with the open issues regarding your proposed substitution of the engine/generator set, the problems hat you encountered regarding the mast assembly and the issue of the compressor that you allege has become obsolete.

2. It is noted in your correspondence and conversations that you unequivocally ignore the significance of note 7.1 of the AFLC Form 762, which is an integral part of the contract.... The intent of this note is to give the PCO the right to review and approve any substitute parts. The contractor is obligated to submit sufficient data to permit a proper evaluation of the impact on unit operation.

3. It is stated in your 14 Jan 91 letter, "Essex is entitled and obligated to rely on the adequacy of your Specification Control Drawing for the procurement of an interchangeable part." However, you fail to note the following germane and significant facts:

a) Note 7.1 of the AFLC Form 762, modifies the drawing in that approval by the PCO is required before a substitution can be made.

b) What you are proposing is an engine/generator set of your own manufacture, apparently untested and only theoretical.

c) In an attempt to work with you and not categorically deny your proposal, we have repeatedly requested that you provide

supplementary information so that we could adequately evaluate your proposed alternate.

d) You have repeatedly refused or delayed submission of adequate data.

* * *

12. The Government is entitled and obliged to rely upon the integrity and tenacity of those companies and individuals with whom we contract. Your failure to identify your proposed substitution of the engine/generator set to the PCO prior to award or even early in the First Article production process, as well as your refusals to provide adequate information and data for us to evaluate your proposed change violates a relationship in which the producer receives fair and reasonable consideration and the government receives a usable item. It is incomprehensible that a manufacturer would insist on substituting an untested, major component of a system and not comply with the desires of the purchaser to evaluate its effect on performance, especially when the terms of the contract give that specific right.

(ASBCA 45663, R4, tab 47)

On 6 May 1991 appellant responded by stating that it had been prepared to commence first article testing in January 1991. Appellant concluded by requesting a final decision to be issued if the CO disagreed with its interpretation of the contractual requirements:

We hereby respond to your letter dated April 25, 1991. We reject the implicit and explicit

invective in your letter and the threats implicit in that invective. We request an early meeting with you to discuss and resolve the contract issues discussed herein. In particular we require and desire an immediate resolution of the Government's use of previously undisclosed contract interpretations and requirements to justify a refusal to cooperate in the conduct of contractually required First Article tests on the completed Essex First Article unit.

* * *

Your ¶ 12 is insulting and demeaning to our status as a reputable small business supplier to the Government of the United States. We are distressed that an individual endowed with a U.S. Government Contracting Officers [sic] warrant should consider it appropriate to require performance on a matter other than by the terms of the contract, and threaten to besmirch Essex's integrity and tenacity because Essex would not involuntarily accede to what you have acknowledged were "unacceptable terms."

It is Essex [sic] desire to provide the flood lights at the accepted price and in accordance with the contract requirements. If you disagree with our interpretation of the requirements then it is your obligation to issue a Final Decision documenting an ordered performance in accordance with that interpretation. A delivery schedule does not presently exist in the Contract. Any schedule unilaterally mandated by you must be reasonable.

* * *

I would suggest an early meeting at which

we may discuss this contract and how we are to proceed.

(ASBCA 45663, R4, tab 48)

By letter dated 28 June 1991, the Termination Contracting Officer (TCO) notified Essex that Contract-0410 was being terminated for the convenience of the government:

NOTICE OF TERMINATION FOR CONVENIENCE

> Contract Number F41608-90-D-0410, dated 27 December 1989, and order 0001, dated 27 December 1989 are completely terminated under contract Clause No I-684, effective 28 June 1991.... Detailed instructions follow.... Termination modifications will follow.

(ASBCA 45663, R4, tab 6) The TCO terminated Contract-0409 for the convenience of the Government on 22 July 1991 (ASBCA 45664, tab 7).

By letter of 11 July 1991, the TCO provided instructions to appellant regarding the preparation of the settlement proposal under Contract-0410. The letter provided, in relevant part:

> In accordance with our telephone conversation of 10 Jul 91, enclosed are the following forms to be used by your firm in preparation of a Settlement Proposal on subject completely terminated contract.
>
> * * *
>
> Should you be considering settlement expenses,

> FAR 31.205-42 addresses this subject. Please maintain separate records for the directly, charged settlement expenses, the time, type of task performed, and employee performing the effort. The cost must be reasonable, i.e. related to time a person or company would expend on their own, in the normal conduct of business, without expecting reimbursement by another party.
>
> * * *
>
> Please advise me no later than 2 August 91 of the estimated amount of your proposal to facilitate the required recommendation for release of excess funds in accordance with FAR 49.105-2.

(Gov't mot. exh. A)

Modification P00001 for Contract-0410 and modification P00001 for Contract-0409 confirmed the termination of both contracts for the convenience of the Government. The modifications were signed by the TCO on 2 August 1991 (ASBCA 45564, R4, tab 2; ASBCA 45663, R4, tab 7)

Essex proffered its submission under Contract-0410 on 26 June 1992 in which it requested payment of $635,434. The submission stated in part:

> In accordance with the Contract Disputes Act and FAR § 49.114, as well as the termination of the referenced Contract allegedly for the convenience of the Government on June 28, 1991, enclosed you will find our Claim, certified as required by the Act. The enclosure includes Claims for changes including the Government-caused first article delays and production disruption, as well as the

> Government's breach by its wrongful termination in bad faith, totaling $635,434, after crediting prior progress payments. In accordance with the cited Regulation, the enclosure encompasses the previous demands for final decisions submitted by Essex on May 6, 1991, with respect to disputes regarding specification control drawings and deficient Government technical data on which interest has been accruing since that date.
>
> * * *
>
> In accordance with the Contract Disputes Act, we hereby certify that the enclosed claim is made in good faith, that supporting data is accurate and complete to the best of our knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which Essex Electro Engineers, Inc., believes the Government is liable. In addition, consistent with the current state of decisions, negotiation of this claim is abandoned, a final decision is hereby demanded, the net payment claimed is a sum certain, and, although we will consider accepting a reasonable and timely payment by you of the amount due in order to resolve this matter, we insist upon the time requirements of the Contract Disputes Act for a response to this claim.

The proposal was signed by Frank J. Pawlowski, Essex's president (ASBCA 45663, R4, tab 52).

By letter of 1 July 1992, the TCO responded to Essex's submission under Contract-0410, stating in relevant part:

> Reference your 26 June 1992 submittal in

response to the termination of the subject contract.

It has been noted that in your cover letter submitting subject termination settlement proposal, you certified the proposal as a claim.

Please be advised that under the Contract Disputes Act of 1978, "a voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purpose of the Act." In *Mayfair Construction Company v. United States*, 841 F.2d 1576 (Fed.Cir. 1988), the Court held that a termination settlement proposal was not a claim under the Contract Disputes Act, and could not be converted into a claim by the contractor's certification. The Court's reasoning was that at the time of the proposal submission the parties were still in a "pre-dispute negotiation posture." In the absence of a dispute, the Court held that the contractor was not entitled to interest. Further, per FAR 49.112-2(d), Interest, "The Government shall not pay interest on the amount due under a settlement or a settlement by determination." See also *DAWCO Construction, Inc. v. United States*, 930 F.2d 872 (Fed.Cir. 1991).

In accordance with the above, your submission cannot be considered a claim within the meaning of the Contract Disputes Act. I have every reason to believe that we will be able to reach a mutual settlement through negotiations.

* * *

Your current proposal is being processed normally, i.e., plant clearance has been requested

(approximate turn around time-six months) and a DCAA Audit has been requested in accordance with FAR 49.107. As questions arise regarding items in your proposal, you will be contacted. After all termination reviews and plant clearance have been completed, negotiations can begin to resolve your termination settlement proposal.

To date, no discussions subsequent to the initial conference have taken place on this contract. Since a settlement has never been discussed, there is nothing to indicate this cannot be negotiated, nor is this matter considered to be at an impasse.

(Gov't mot., exh. B)

Essex proffered its submission under Contract-0409 on 22 July 1992 in which it requested payment of $20,603. It stated, in pertinent part, as follows:

In accordance with the Contract Disputes Act and FAR § 49.114, as well as the termination of the referenced Contract allegedly for the convenience of the Government, effective August 12, 1991, enclosed you will find Essex's Claim, which does not require the certification under the Act because it is less than $50,000. The enclosed Claim for $20,603, involves the unamortized costs and profit associated with the spare parts (CLIN 0002) and the provisioning data (CLIN 0004) and post-termination expenses.

In accordance with the Contract Disputes Act, the enclosed Claim is submitted to you for a final decision. IN addition, consistent with the current

> state of decisions, negotiation of this claim is abandoned, a final decision is hereby demanded, the net payment claimed is a sum certain, and, although we will consider accepting a reasonable and timely payment by you of the amount due in order to resolve this matter, we insist upon the time requirements of the Contract Disputes Act for a response to this claim. Further, if you consider the enclosure to be a routine invoice or voucher and not a claim, we demand payment within thirty days or interest will accrue in accordance with the Prompt Payment Act.

(ASBCA 45664, R4, tab 8)

By letter of 21 August 1991, the TCO responded to appellant's proposal under Contract-0409, stating:

> It is noted that your 22 July 1992 submission of your termination settlement proposal is certified as a claim. It is also noted that this is your first submission as a result of the termination. No reviews have been done previously regarding the facts or amount contained therein. In addition, you refer to the contract number as F41608-90-D-0409.
>
> Please be advised that under the Contract Disputes Act of 1978, "a voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for th purpose of the Act." In *Mayfair Construction Company v. United States*, 841 F.2d 1576 (Fed.Cir. 1988), the Court held that a termination settlement proposal was not a claim under the Contract Disputes Act, and could not be converted into a claim by the contractor's

certification. The Court's reasoning was that at the time of the proposal submission the parties were still in a "pre-dispute negotiation posture." In the absence of a dispute, the Court held that the contractor was not entitled to interest. Further, per FAR 49.112-2(d), Interest, "The Government shall not pay interest on the amount due under a settlement or a settlement by determination."

In accordance with the above, I do not recognize your certified submission as a claim within the meaning of the Contract Disputes Act. I have every reason to believe that we will be able to reach a mutual settlement through negotiations.

* * *

I consider contract F41608-90-D-0410/0001 and contract F41608-90-C-0409 separate contracts. They were awarded separately and I am treating them separately. Since they are separate, please submit separate documentation to support the proposal for contract F41608-90-0409 so that proper consideration can be given to that proposal.

* * *

Your Termination Settlement Proposal is being process through normal channels. Plant clearance and DCAA Audit have been requested. Once I have received the requested reports, I will be ready to open negotiations to settle this matter.

(ASBCA 45664, R4, tab 9)

By letter dated 16 September 1992, referencing both Contract-0410 and Contract-0409, Essex, by its attorney, contended:

Your letter of August 21, 1992, to our client, Essex Electro Engineers, Inc., regarding "Contract F41608-90-C-0409", indicates a certain amount of confusion apparently attributable to your opinion that Contract-0409 is somehow separable from the above referenced Contract-0410. Regardless of the manner in which you may choose to process the claims submitted on the contracts, your opinion fails to recognize that two contract numbers exist only because the Government elected to create two documents covering the requirements of a single solicitation, F41608-89-R-4743, and Contract-0409 explicitly refers to its companion Contract-0410. Also, your reference to "separate documentation" was submitted on June 26, 1992, and on July 22, 1992, of the "amount claimed" for each contract number on the forms and with the certification on the forms prescribed by the TCO. [See, FAR § 52.249-2(d).]

* * *

Also, your reference to a certification of the claim dated July 22, 1992, for Contract-0409 is not understood since a CDA certification of the claim was not provided and is not required because it does not exceed $50,000. The claim dated June 26, 1992, for Contract-0410 included the necessary CDA certification because it exceeds $50,000.

Your letter disputes Essex's claims and statutory right to interest and references *Mayfair Construction Company v. United States*, 841 F.2d 1576 (Fed.Cir. 1988) and FAR § 49.112-2(d). As you must know from a review of *Mayfair*, that decision rested on an interim "Disputes"

Regulation which is not applicable here, and did not address the specific requirements of the CDA as requiring a "Dispute" before a "Claim" could exist. The only evidence that could exist for your apparent contention that each claim here is "a voucher, invoice, or other routine request for payment" that is not disputed would be your immediate payment of the full amount of each claim.

More recent decisions since *Mayfair, Dawco Construction Co., Inc. v. United States*, 930 F.2d 872 (Fed.Cir. 1991), and *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576 (Fed.Cir. 1992), *cert. pending*, regrettably also contradict the CDA and its legislative history as well as other precedents in holding that all negotiations between the parties must be abandoned in order for a claim to exist. As noted in the claims for Contract-0409, Essex has unqualifiedly abandoned negotiations and demanded a final decision. We reject your premise that the Government may dictate when a claim exists by the expedient of choosing when, if ever, to characterize the matter as being "in dispute."

In addition, even if your reference to an agency regulation, FAR § 49.112-2, was applicable to this situation where negotiations have been abandoned, that regulation has not force or effect since it directly contradicts the CDA and its legislative history. The executive agencies lack the legislative authority to withhold a statutory right enacted by Congress.

Accordingly, your dispute of the claims and

the statutory right to interest is unavailing. Further, your stated belief that "we will be able to reach a mutual settlement through negotiations" unfortunately cannot occur because, in order to preserve Essex's rights, Essex has been forced by the foregoing decision to abandon all negotiations and proceed in accordance with the law.

* * *

Your agency has a track record; i.e., Contract N00140-85-C-1436 and DAAE07-87-C-2665, of delays for years before any effort is made to resolve terminations for convenience while the contractor is left with financing the Government's debt. We have no intention of allowing that record to re-occur. While you have already failed to take prompt action to resolve the claims as required by FAR § 49.101(d) and the CDA and you have disputed the claims, the right to interest and the inclusion of the description of the "Target-Essex Strategy", there are some legal precedents, again contradicting the CDA and its legislative history, indicating a need for a resubmission of termination claims in order for them to be considered claims. Also, your letter cannot be reconciled with the CDA unless it is simply a request for additional time as provided in the Act.

Consequently, taking your letter as a request for additional time to resolve the claim and in order to preserve Essex's rights in the event that a forum might conclude that the existence of a claim depends upon a resubmission, enclosed is a copy of the claim of June 26, 1992, for contract-0410 with a renewed certification in accordance with the language in the Contract Disputes Act. A

> resubmission of the claim for Contract-0409 of July 22, 1992, will be made if no resolution has occurred within the time required by the CDA.
>
> This resubmission is made solely for the purpose of preserving Essex's right and in no way constitutes a waiver of the existence of the valid and lawful claim submitted on June 26, 1992, and on which interest is accruing from the receipt of that claim to the date of payment of the amount due. Further, this resubmission is not an offer to negotiate nor to do other than proceed with the formal claims process under the Contract Disputes Act.

(ASBCA 45664, R4, tab 10)

By letter dated 2 October 1992, Essex resubmitted its "claim" under Contract-0409. It stated:

> As discussed in our letter of September 16, 1992, and subject to the same terms and conditions stated therein, enclosed is the resubmission of the subject claim.

(ASBCA 45664, R4, tab 11)

Appellant filed two notices of appeal on 27 January 1993. The Board docketed the appeal under Contract-0410 as ASBCA No. 45663 and the appeal under Contract-0409 as ASBCA No. 45664.

The Government attached the affidavit of DCAA auditor Howard M. Salita to its 16 September 1993 Response to appellant's opposition. The affidavit stated, in pertinent part:

> The DCAA was not dilatory in its efforts to audit Appellant's proposals. In fact the reverse is true. The contractor was dilatory in its efforts to provide the Government substantiation for many of the questions raised during the audit. Essex has caused a considerable delay in, and prolonged the auditing process of its own proposals.
>
> I must first point out that Appellant's termination settlement proposals are not routine termination settlement proposals. Most routine settlement proposals require the audit of only one contract. Under Contract 1410 Essex actually had three audits built into one proposal.

The auditor concluded his affidavit by stating: "[T]he lack of response and cooperation by Essex during our audit efforts significantly impacted the time needed to complete these audits." (Gov't. resp., exh. A) 1/

On 31 September 1993, appellant filed a motion to strike the Government's "Response," stating that the "Governments 'Response'...boils down to nothing more than a position that Essex may not pursue a resolution here because the Government has refused to undertake any action to resolve the claim and thus has avoided giving voice to a 'dispute' and because the Government issued multiple terminations which allegedly 'overloaded' its 'audit' employee." (App. mot. to strike at 2).

DECISION

It is axiomatic that "[a]ll claims by a contractor against the Government relating to a contract shall be in writing and submitted to the contracting officer for a decision." (41 U.S.C. § 605(a)) Another prerequisite for

a claim is that the parties must be involved in an existing dispute. *Dawco Construction Inc. v. United States*, 930 F.2d 872 (Fed.Cir. 1991). In addition, if the contractor's claim for money exceeds $50,000, it must be properly certified. *W.M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed.Cir. 1983). Finally, a contractor must submit, in writing, a "clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed.Cir. 1987).

Appellant contends that both its 26 June 1992 and 22 July 1992 submissions are proper CDA claims in that they: 1) expressly stated they were claims; 2) contained the required certification language (when necessary); and 3) demanded the TCO's final decision. The Government disagrees, arguing that Essex's submissions were merely routine termination for convenience settlement proposals. It also contends that since there was no dispute prior to the submission of the proposals, they do not qualify as claims under the CDA.

Under *Dawco, supra.*, a cost proposal is not a claim unless the parties are already in dispute over the amount requested when the proposal is submitted. *Reflectone, Inc.*, ASBCA No. 43081, 93-1 BCA ¶ 25,512. Furthermore, "[a] dispute cannot be manufactured and interest cannot be made applicable by the mere assertion that a submission is a claim." *Essex Electro Engineers, Inc.*, ASBCA No. 46202 (decided 20 December 1994), *citing CPI Corp. v. United States*, 25 Cl.Ct. 451, 455 (1992). It is also well-settled that a termination for convenience proposal is ordinarily not considered a claim when submitted. *Mayfair Construction Company*, ASBCA No. 30800, 87-1 BCA ¶ 19,542, *aff'd, Mayfair Construction Company v. United States*, 841 F.2d 1576

(Fed.Cir.), *cert. denied*, 488 U.S. 980 (1988). Accordingly, appellant's submissions of 26 June 1992 and 22 July 1992 were merely the first step in the opening of negotiations. *Reflectone, supra.; Electrodynamics*, ASBCA No. 43224, 93-1 BCA ¶ 25,303; *Hugo Auchter GmbH*, ASBCA No. 33123, 88-3 BCA ¶ 20,926. 2/

We find nothing in the record to establish the existence of a certified dispute contemporaneous with the submission of the 26 June 1992 or the 22 July 1992 settlement proposals. Therefore, neither of these submissions constituted a claim. Moreover, as the submissions were not claims, the requirement that a final decision be issued within 60 days under the CDA did not apply.

The events following Essex's 26 June 1992 and 22 July 1992 submissions present the issue in a different light. Appellant's resubmissions (dated 16 September 1992 and 2 October 1992, respectively) did in fact invoke the CDA, purported to "resubmit the termination claims," and asserted that an appeal would be filed if a final decision or other resolution was not forthcoming in 60 days. We recently faced a similar situation in *Essex Electro Engineers, Inc.*, ASBCA No. 46202 (slip op. 20 December 1993), where the Board held that no claim existed because there was no underlying dispute.

It is now well-settled that when the parties are in a pre-dispute negotiation posture, a contractor's resubmissions will not be considered claims even though he has invoked the CDA and has characterized his submissions as claims. *See Mayfair, supra.* at 1577; *CPI Corp., supra.* at 455. Here, the correspondence between the parties did not rise to the level of a pre-dispute, negotiation posture. The TCO's correspondence of 1 July

1992 and 21 August 1992 served only to clarify to Essex the process guiding the terminations for convenience and to put it on notice that neither of its submissions was considered a claim under the CDA. At best, the TCO seemed overly optimistic that the parties would reach a "mutual settlement through negotiations" once he had received the requested "plant clearance" and "DCAA audit" reports. Thus, we find that there was no "objective manifestation" by the TCO that appellant's "claims" could not be settled or that an "impasse" had been reached in the negotiation process by failing to agree upon the amount of a termination settlement as provided in the Termination for Convenience clause. *See R.G. Robbins Co.*, ASBCA No. 26251, 82-1 BCA ¶ 15,643; *Saco Defense, Inc.*, ASBCA Nos. 44792, 45171, 93-3 BCA ¶ 26,029.

When a contractor submits a certified claim in excess of $50,000, the contracting officer, within 60 days of receipt of the claim, must either issue a decision or inform the contractor when a decision will be issued. 41 U.S.C. § 605(c)(2). If the contracting officer fails to respond within 60 days, the contractor may appeal the claim to the board of contract appeals based upon the rationale that the Government has failed to act within a "reasonable time." 41 U.S.C. § 605(c)(3) and (5).

However, if the contracting officer does not possess the requisite information, then he is not obliged to render a decision. *See Gauntt Construction Co.*, ASBCA No. 33323, 87-3 BCA ¶ 20,221. "Without such information the contracting officer would be precluded from making a meaningful review of the claim and thus be unable to make the requested determination." *Logus Manufacturing Co.*, ASBCA No. 26436, 82-2 BCA ¶ 16,025 at 79,416. To require the contracting officer to

render a decision on the basis of inadequate information would amount to "an exercise in futility." *Logus, supra.* In such a situation, we would lack jurisdiction to consider the purported appeal. *J. J. Bonavire Co.*, ASBCA No. 29846, 86-2 BCA ¶ 18,788.

It is not unreasonable for a TCO, in accordance with standard procedures governing Termination Settlement Proposals, to request a plant clearance and a DCAA audit (as mandated by FAR 49.107) when reviewing proposed settlement costs *See generally, Swiss Products, Inc.*, ASBCA No. 40031, 93-3 BCA ¶ 26,163; *R.G. Robbins, supra.* Here, the TCO apprised Essex of this procedure and further indicated a willingness to "open negotiations and settle this matter" once he had received the reports.

It is not unreasonable to assume that a contractor would provide full cooperation during the course of an audit in order to settle its costs. Here, the auditor's affidavit states the contrary. In fact, according to the auditor, the time consumed by these audits was attributable to Essex, not to the Government: "[T]he lack of response and cooperation by Essex during our audit efforts *significantly impacted the time needed to complete these audits.*" (Emphasis added) In light of the affidavit, unrebutted by appellant, and the surrounding circumstances, we find that the contracting officer's failure to render a final decision was reasonable.

Appellant also contends that the submissions constituted claims for interest under the CDA. It is axiomatic, however, that a request for CDA interest cannot exist without an underlying claim under the Act. *CPT Corp., supra* at 455, *quoting Mayfair, supra* at 1578; *Nab-Lord Associates v. United States*, 682 F.2d 940, 943-

44, 230 Ct.Cl. 694 (1982). "Interest is...an adjunct to an underlying claim with respect to the principal liability. By terms of the [CDA], no interest arises absent some other claim." *Essex, supra* at 766. Because appellant's termination for convenience settlement proposals were not proper CDA claims, Essex is not entitled to interest under the Act's provisions.

We find it unnecessary to address appellant's contentions that such decisions as *Mayfair, supra; Dawco, supra*; and *Essex, supra*, are a contradiction of the CDA and its legislative history in holding that all negotiations between the parties must be abandoned in order for a claim to exist. These contentions were presented verbatim previously by appellant (Gov't. resp., exh. B) and were rejected by the Claims Court in 1991 (*Essex Electro Engineers, Inc. v. United States*, 22 Cl.Ct. 757 (1991)) and later on appeal by the Federal Circuit in 1992 (*Essex Electro Engineers Inc., v. United States*, 960 F.2d 1576 (Fed.Cir. 1992)). this Board, of course, is obliged to follow the precedents of the Federal Circuit.

CONCLUSION

The Government's motion to dismiss for lack of jurisdiction is granted, and the appeals are dismissed without prejudice to the submission of proper claims to the contracting officer.

NOTES

1. We deny Essex's motion to strike the Government's response.

2. Essex also contends that its demand of 6 May

1991 for a CO's decision demonstrated that the parties were in dispute prior to its 26 June 1992 or 22 July 1992 submissions. However, upon review of the record, we do not view appellant's 6 May 1991 demand as a proper CDA submission. Absent were the "clear and unequivocal statements that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning, supra.* at 592. Essex merely stated that if the CO disagreed with its interpretation of the requirements of the contract, then it was the CO's "obligation to issue a Final Decision documenting an ordered performance in accordance with that interpretation."